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Supreme Court, U.S.
FILED

No. 07- 07-300 SEP - 4 2007

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IN THE

Supreme Court of the United States

JAMES F. GREVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHELLY B. KULWIN
KULWIN, MASCIOPINTO
& KULWIN, LLP
161 North Clark Street
Suite 2500
Chicago, IL 60601
(312) 641-0300

Attorneys for Petitioner

210849

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner-taxpayer James Greve (Greve) was indicted for filing false federal personal and corporate income tax returns. The district court denied Greve's pre-trial motions to suppress evidence, to obtain discovery and to conduct an evidentiary suppression hearing. The Seventh Circuit affirmed the district court's order denying Greve's pre-trial suppression motions notwithstanding the fact that Greve presented preliminary, yet specific, detailed, material factual allegations, all of which were un-rebutted by the government and thus deemed true, that the Internal Revenue Service (IRS) violated his Fourth and Fifth Amendment constitutional rights by conducting a bad-faith deceptive criminal investigation of him under the guise of a civil tax audit in which it procured statements and documents from him and other third-parties after obtaining sufficient firm indications of criminal fraud to require constitutionally the IRS to cease its civil investigation activities. Greve's motions for discovery and an evidentiary suppression hearing were denied based upon a presumption that the IRS acted in good-faith during the course of the audit despite the fact that a substantial factual dispute existed between the parties regarding the nature of the IRS' intent and motivation in conducting the investigation.

Two questions are presented:

1. Whether the IRS violates a taxpayer's Fourth and Fifth Amendment constitutional rights during the course of a civil tax audit by continuing its civil audit activities after discovering substantial firm indications of criminal fraud, beginning to prepare the investigation for referral to the IRS' criminal division and affirmatively misrepresenting to the taxpayer the criminal nature of the investigation in order to coerce the taxpayer into providing statements and documents to further the investigation?

2. Whether a taxpayer is entitled to obtain discovery and an evidentiary suppression hearing to determine whether the IRS violated his constitutional rights by conducting a criminal investigation under the guise of a civil tax audit where a substantial factual dispute existed between the parties regarding the nature of the IRS' intent and motivation in conducting the investigation?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. James Greve*, 490 F.3d 566 (7th Cir. 2007). The Seventh Circuit affirmed the December 12, 2005, decision of the United States District Court for the Northern District, Western Division, of Illinois. *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Seventh Circuit's opinion was issued on June 4, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMEND. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMEND. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner-taxpayer James Greve (Greve) was indicted for filing false federal personal and corporate income tax returns arising out of the manner in which he reported income he received from the operation of his family snow plowing business. The indictment grew out of an Internal Revenue Service (IRS) civil tax audit of the Greves' 1997 federal income tax return.

During the course of the criminal case, the government produced its Federal Rule of Criminal Procedure Rule 16 disclosures which contained preliminary, yet specific, facts establishing that the IRS, in violation of Greve's Fourth Amendment right to be free from unreasonable searches and seizures, and his Fifth Amendment constitutional right against self-incrimination, conducted an unconstitutional criminal investigation of Greve, by obtaining statements and documents from him, and other third-parties, under the guise of a civil tax audit.

Specifically, the government's Rule 16 disclosures established that the IRS engaged in serious constitutional violations during its civil tax audit of Greve all of which have repeatedly been held as sufficiently unconstitutional to

warrant either dismissal of criminal tax fraud indictments based upon the evidence obtained through bad-faith deceptive investigations, suppression of the evidence obtained by the IRS during such investigations or, at a minimum, an evidentiary suppression hearing to determine whether the IRS, in fact, committed constitutional violations during the course of its investigation including, among other things, evidence that the IRS made affirmative misrepresentations of the nature of the audit, deceptively responded to direct inquiries about the nature of that investigation, falsely promised a civil resolution of the audit in return for the unwitting and thus involuntary waiver of constitutional rights and employing administrative measures to obtain third-party documents long after it abandoned any civil purpose for requesting such documents.

Here, the IRS continued its civil audit activities notwithstanding the fact that it had substantial firm indications of criminal fraud including, among other things:

> Greve provided the IRS revenue agent (RA) conducting the civil audit an inherently unbelievable and incredible explanation for failing to report substantial business income that he received from his customers.
>
> The RA determined almost immediately after beginning her civil audit that Greve kept "inadequate" books and records, to the extent he maintained any at all, employed "unacceptable" accounting procedures, failed to provide to her all of the material she had requested during the audit and had, in fact, given her fraudulent (*i.e.*, altered) documents, had "several" large cash

transactions, had hidden bank accounts, and had transferred his home into trust following the inception of the IRS audit.

The IRS conducted its civil audit activities at the specific direction of the IRS' District Fraud Coordinator who discussed with the RA the specific next steps the RA needed to take to make the criminal fraud case against Greve and to refer the case for criminal prosecution including, among other things, expanding the audit to include the other tax years and obtaining supporting documentation to help build a three year pattern of fraud required to support a criminal referral; using tools that could be employed to find other hidden accounts where additional unreported income might be located; initiating interviews of, and sending administrative summons to, third parties in an effort to locate other potential unreported income; and checking suspected fraudulent documents received from Greve against original source documents. The IRS' District Fraud Coordinator also provided the RA during the course of the purported civil audit with instructions on how to fill out a "Civil Fraud Penalty Monitoring Form" which is used "in all cases involving (1) Examination Fraud Referral to Criminal Investigation Division; and (2) Criminal Investigation Generated Case." To further establish that the IRS was, in fact, conducting an unconstitutional criminal investigation of Greve under the guise of a civil audit, the RA, while continuing her civil audit activities, downloaded the IRS Manual's procedures for making a criminal fraud referral and set appointments to write up the referral of Greve to the IRS criminal investigation division.

During her investigation, the RA made affirmative misrepresentations of the nature of the audit to Greve and

his attorney in order to obtain Greve's involuntary and thus unwitting waiver of his constitutional rights including, among other things, falsely advising Greve that, once he and others provided to her the documents she was seeking, she would determine his tax liability and "conclude the audit," that the audit would be "done," and "wrapped up pretty quickly," and further indicated that no criminal referral was being considered while she was, in fact, simultaneously preparing to refer the matter to the IRS criminal division. Both Greve and his attorney submitted affidavits in support of Greve's pre-trial motions to establish, *inter alia* that Greve provided information to the IRS and answered questions based on his clear understanding that he was cooperating in a civil audit the sole purpose of which was to ascertain his civil tax liability and that he never would have provided any of the information he gave to the IRS during that audit had he known that it was being used principally to further a criminal fraud investigation.

The IRS Special Agent assigned to develop the criminal case against Greve re-traced the precise steps taken by the RA and the IRS District Fraud Coordinator during the purported civil audit of Greve and used that very same information to expand the criminal investigation. The government ultimately employed the exact same factual theory developed by the RA and the IRS District Fraud Coordinator during the IRS' purported civil audit of Greve as its main theory of prosecution.

Greve filed pre-trial motions seeking, among other things, to dismiss the indictment, to suppress evidence, to conduct discovery for an evidentiary suppression hearing, and for an evidentiary suppression hearing based upon the IRS' alleged bad faith investigatory conduct on the grounds

that it unconstitutionally continued to conduct a civil audit of Greve long after it obtained substantial firm indications of criminal fraud sufficient to require it constitutionally to cease its civil audit activities. In response to Greve's pre-trial motions, the government submitted neither affidavits from the IRS agents involved in the Greve audit to attest to the good-faith nature of their conduct, nor any substantive evidence to oppose Greve's pre-trial motions. As a result, the preliminary, yet specific, detailed and material facts supporting Greve's allegations of intentional unconstitutional conduct stood un-rebutted.

On December 12, 2005, the district court deemed as true all of the specific, detailed, and material facts supporting Greve's allegations of the IRS' intentional unconstitutional investigation of him yet denied Greve's pre-trial motions without allowing discovery or conducting an evidentiary suppression hearing. On April 20, 2006, Greve entered a conditional guilty plea to Count IV of the indictment pending an appeal of the district court's order denying his pre-trial motions. On July 27, 2006, Greve was sentenced and judgment was entered. Greve filed his notice of appeal on August 3, 2006.

REASONS FOR GRANTING THE PETITION

Whether the IRS violates taxpayers' Fourth and Fifth Amendment rights during the course of a civil tax audit, and under what circumstances taxpayers have the ability to obtain discovery and are provided the opportunity to conduct an evidentiary suppression hearing to determine whether the IRS conducted an unconstitutional criminal investigation under the guise of a civil audit, are important questions

implicating all taxpayers' constitutional rights and on which the Seventh Circuit has now sanctioned a substantial departure from the accepted and usual course of judicial proceedings all of which supports the exercise of this Court's supervisory powers and on which this Court's guidance is urgently warranted.

Specifically, the Seventh Circuit has vitiated longstanding federal law requiring the dismissal of indictments and/or the suppression of evidence obtained by the IRS during the course of civil tax audits through intentional bad-faith deceptive and unconstitutional investigatory practices by conducting criminal investigations under the auspices of civil tax audits in the very manner in which the IRS acted here, *i.e.*, by making affirmative misrepresentations of the nature of the audit, deceptively responding to direct inquiries about the nature of that investigation, falsely promising a civil resolution of the audit in return for the unwitting and thus involuntary waiver of a taxpayer's constitutional rights and employing administrative measures to obtain third-party documents long after the IRS abandoned any civil purpose for requesting such documents.

Perhaps more importantly, the Seventh Circuit's opinion affirming the district court's order to deny Greve's pre-trial motions without discovery or conducting an evidentiary suppression hearing ignores and values at zero the important constitutional check on law enforcement activities provided by allowing defendants to challenge government investigative actions through motions to suppress evidence, discovery on those motions and evidentiary hearings on the factual issues raised in such motions. Indeed, the Seventh Circuit has now empowered district courts to preempt any real examination of the IRS' investigative actions, and eliminated the need

for any substantiative fact finding, by creating a *de facto* unrebuttable presumption of the constitutionality and good-faith conduct of government agents based on factually unsupported rhetoric about the innocent intent, motives, and knowledge of government agents who are accused of committing serious constitutional violations during the course of a tax audit.

At the core of its decision, the district court denied Greve's pre-trial motions out of a concern for converting every IRS civil tax investigation into a criminal one at its outset. However, the Seventh Circuit, in affirming that order, has swung the balance between legitimate government investigatory practices, and the fundamental rights of individuals to be free from unconstitutional law enforcement activities, too far in favor of the government and vitiated completely any real Fourth and Fifth Amendment protections for taxpayers involved in IRS investigations. The IRS' investigation of Greve here was far more than a garden variety civil tax audit which ultimately evolved into a criminal tax fraud prosecution. This case involved nothing less than an intentional bad-faith investigation by the IRS; a criminal investigation being conducted under the guise of a routine civil audit; affirmative misrepresentations, both oral and written, by the IRS for the purpose of deceiving a taxpayer and his attorney into providing both oral and documentary evidence which the IRS viewed as critical to make, and which it employed to prosecute, a criminal tax fraud case against him; and the use of administrative means to obtain information well after the IRS had not only believed it had substantial firm indications of criminal fraud, but also after it had begun formal preparation of the criminal fraud referral and had abandoned, in an institutional sense, any civil

purpose for employing such administrative means and/or had made an institutional commitment to recommend prosecution.

In the final analysis, this Court should grant this petition to provide crystal clear guidance regarding the scope of the Fourth and Fifth Amendment protections afforded to taxpayers involved in IRS audits and to clarify under what circumstances such taxpayers are entitled to obtain discovery and conduct evidentiary suppression hearings to determine whether the IRS engaged in intentional bad-faith and deceptive unconstitutional investigatory practices.

I. REVIEW IS WARRANTED TO ARTICULATE A CLEAR STANDARD CONCERNING WHEN THE IRS DURING THE COURSE OF A CIVIL TAX AUDIT VIOLATES TAXPAYERS' FOURTH AND FIFTH AMENDMENT CONSTITUTIONAL RIGHTS.

It is well established that "a consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment, if the consent was obtained by fraud, deceit, trickery or misrepresentation by the [IRS] revenue agent." *See U.S. Const. Amend.* IV-V; *U.S. v. LaSalle National Bank*, 437 U.S. 298 (1978); *U.S. v. Utecht*, 238 F.3d 882 (7th Cir. 2001); *U.S. v. Peters*, 153 F.3d 445 (7th Cir. 1998); *U.S. v. Tweel*, 550 F.2d 297 (5th Cir. 1977). To establish such a constitutional violation, the taxpayer must demonstrate that IRS revenue agents made an affirmative misrepresentation about the true nature of their examination and the misrepresentation was "material" in his decision to speak with agents and/or provide them with documentary "material." *Id.* Accordingly, if IRS agents were in fact

conducting a criminal investigation under the auspices of a civil audit, then they affirmatively misrepresented the nature of their investigation. *Id.*; *U.S. v. Nuth,* 609 F.2d 228 (5th Cir. 1979) (an affirmative misrepresentation by an IRS agent that the investigation is routine when in fact it is a criminal investigation requires suppression of evidence).

District courts should conclude such a "covert criminal investigation" was ongoing, and in turn the affirmative misrepresentation required to sustain a constitutional violation, if it determines the IRS revenue agents "continued to audit defendant after they developed a firm indication of fraud." *Id.* Courts have identified several factors as relevant to determine whether IRS agents affirmatively misled a taxpayer during the course of a purported civil audit, including, among others: (1) failure to advise a tax payer of the obvious criminal nature of the investigation; (2) a misrepresentation of the possibility of a criminal referral in order to obtain information for use in the fraud investigation; (3) active involvement by a criminal investigator in a civil audit prior to a criminal referral being made; (4) a continuation of audit activities after the agent begins preparation of the criminal fraud referral; and (5) an agent's continuing civil investigation in the face of firm indications of fraud. *See Peters*, 153 F.3d 453-54; *Tweel*, 550 F.2d at 299-300.

Here, there was preliminary, yet substantial, evidence to establish all of these factors that the IRS conducted a "covert criminal investigation" and made the requisite affirmative misrepresentations to Greve legally sufficient to find a serious constitutional violation by continuing to audit Greve after it developed substantial firm indication of criminal fraud, *i.e.*, that the IRS conducted an unconstitutional bad faith deceptive

investigation by failing to advise Greve of the obvious criminal nature of the investigation, by actively involving a criminal investigator in the civil audit process, continuing its civil audit activities after it obtained not only firm but obvious indications of criminal fraud, actual deception about the nature of the IRS' investigation and false promises of the nature of that investigation in order to wrongfully obtain evidence from Greve.

The Seventh Circuit, however, affirmed the district court's order on the grounds that the IRS could not violate Greve's constitutional rights, notwithstanding the fact that it was conducting a covert criminal investigation under the guise of a civil audit, unless its agents "pretend[ed]" to be Assistant United States Attorneys assuring Greve that he will not be prosecuted if he cooperates with the investigation. *See Appendix* A. p. 10a. Initially, the undisputed evidence deemed as true in this matter firmly established that the IRS made those very kind of unconstitutional promises to Greve to procure his cooperation with the audit *i.e.*, the IRS falsely promised Greve in order to obtain his cooperation with the audit that the audit would be "wrapped up," "done," "concluded" and that there would be no criminal referral upon the provision of the additional information it was seeking while the IRS knew that those statements were false given that it was simultaneously developing a criminal fraud case against Greve and preparing to refer the matter to the IRS criminal division.

The Seventh Circuit's opinion – sanctioning, for Fourth and Fifth Amendment purposes, a covert criminal investigation of a taxpayer during the course of a civil tax audit absent evidence that the IRS investigating agent "pretend[ed]" to be an Assistant United States Attorney

promising no prosecution of the taxpayer if he cooperates with the investigation – is in direct conflict with the Fifth Court of Appeals decision in *U.S. v. Tweel*, 550 F.2d 297 (5th Cir. 1977), and others, in which courts have held that IRS agents violate taxpayers constitutional rights by misrepresenting the obvious criminal nature of the investigation in order to procure cooperation with an investigation. Any standard holding that the IRS could not possibly violate taxpayers' Fourth or Fifth Amendment constitutional rights absent evidence that the agent "pretended" to be an Assistant United States Attorney ignores the reality that sophisticated IRS agents know better than to ever "pretend" to be Assistant United States Attorneys and completely disregards serious unconstitutional misrepresentations made by IRS agents, like the ones at issue here, designed solely to coerce taxpayers into involuntarily waiving their constitutional rights which conflicts directly with the fundamental purpose and guarantees provided by the Fourth and Fifth Amendments. *See Beckwith v. U.S.*, 425 U.S. 341 (1976) (recognizing that non-custodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . ." so as to violate an individual's constitutional rights); *Wong Sun v. U.S.*, 371 U.S. 471 (1963) (excluding evidence obtained in an unconstitutional search an seizure compels respect for the constitution by removing the incentive to disregard it).

To further emphasize the point, the Seventh Circuit held that the IRS did not misrepresent the nature of its investigation of Greve because the IRS was not required constitutionally to advise Greve or his attorney that it "might" refer the case to the criminal investigation division. *See* Appendix A, p. 10a. This holding, however, ignores the

undisputed facts deemed true here that the IRS was throughout its civil investigation, in fact, preparing to refer the matter to the criminal division – in other words, referral to the criminal division was not merely a possibility in this case as it likely is in every civil tax audit, it was a forgone conclusion from practically the outset of this civil audit rendering all of the statements to the contrary made by the IRS to Greve and his attorney unconstitutionally deceptive. *See U.S. v. Tweel, supra.*

The significance and impact of the Seventh Circuit's holding is underscored by its implicit endorsement of the district court's explicit holding that, as a matter of law, the IRS only continues unconstitutionally its civil audit activities after it begins the actual physical preparation of the criminal referral form itself. *See* Appendix B, pp. 17a-18a. In so holding, the Seventh Circuit adopted and endorsed a first ever bright-line test that nothing that IRS agents do before beginning the actual preparation of the actual criminal referral document could demonstrate the unconstitutional acquisition of evidence. This circular logic eliminates entirely any protections to taxpayers afforded by the Fourth or Fifth Amendment. Indeed, now, based on the Seventh Circuit's opinion, the IRS could never violate the constitution in gathering evidence for a criminal prosecution since it will simply conduct civil tax audits of any potential criminal defendants, shield all of its actions from judicial scrutiny by delaying beginning the actual physical preparation of the criminal referral itself until the end of its investigation, and assert in response to constitutional challenges to its conduct during the investigation that all of the evidence gathered prior to the preparation of the criminal referral was done merely an effort to ensure that sufficient evidence existed to make the referral.

1050 (3rd Dist. 1996) (conducting pre-trial evidentiary suppression hearing "more prudent" and "better practice" where there were conflicting affidavits regarding the nature of the government's investigative conduct); *U.S. v. Millman*, 822 F.2d 305 (2nd Dist. 1987) (the motivation of the IRS agent involved may be relevant to the determination of the constitutionality of the IRS' posture); *U.S. v. Genser*, 595 F.2d 146 (3rd Cir. 1979) (same). Taxpayers are now unable to challenge the good-faith conduct of IRS agents in a civil tax investigation if district courts adopt an un-rebuttable presumption that IRS agents act in good-faith in the complete absence of any submission by the government to rebut allegations of unconstitutional conduct nor the opportunity to develop during discovery or cross-examination of the IRS agents themselves what they knew about the investigation and when they knew it.

At the very minimum, the district court should have permitted discovery and held an evidentiary hearing to resolve the key factual dispute emanating from the parties' markedly different versions of events: whether the IRS acted in good-faith during the course of its audit activities. Evidentiary hearings are, by their very nature, designed to elicit the underlying facts when a defendant challenges the purported good faith of investigating agents to determine whether their conduct rose to the level of constitutional violations.

In sum, Greve should have been able to test the government's assertion of the IRS' purported good faith through examination of witnesses and receipt of relevant discovery. The Seventh Circuit's substantial limitation on the important check on law enforcement activities established by conducting evidentiary suppression hearings presents a substantial legal issue justifying Supreme Court review.

CONCLUSION

For all of the above reasons, petitioner James Greve respectfully requests that this Court grant review in this matter.

Respectfully submitted,

SHELLY B. KULWIN
KULWIN, MASCIOPINTO
& KULWIN, LLP
161 North Clark Street
Suite 2500
Chicago, IL 60601
(312) 641-0300

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 4, 2007

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-3127.

UNITED STATES of America,

Plaintiff-Appellee,

v.

James F. GREVE,

Defendant-Appellant.

Argued: April 13, 2007.

Decided: June 4, 2007.

Before FLAUM, MANION, and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

A grand jury indicted James Greve on four counts of income tax offenses all in violation of 26 U.S.C. § 7206(1). Greve filed a motion to dismiss the indictment and/or suppress evidence, alleging that the Internal Revenue Service ("IRS") violated his Fourth and Fifth Amendment rights by conducting a covert criminal investigation under the guise

of a civil audit. The district court denied Greve's motion, stating that the facts reflected a "typical IRS civil investigation that ultimately led to a criminal referral." Greve appeals. For the following reasons, we affirm the district court's judgment.

I. Background

James Greve took over Greve Construction, the family business, in 1990 and converted it into a commercial snow plowing company for shopping centers, school districts, and other municipal entities. Until early 2000, Greve operated his business without an accountant and kept track of business income and expenses through billing invoices and expense receipts. Through 1999, Greve prepared his own federal and state income tax returns, employing a hybrid cash and accrual method of reporting income.

On June 28, 1999, the IRS began a civil audit of Greve's 1997 federal income tax return. Greve contacted revenue agent Ramona Luke and scheduled a meeting for August 5, 1999; however, Greve missed the scheduled appointment. On August 5, 1999, Luke issued Greve an examination report and proposed to add $143,023 in additional income to his 1997 taxable income and assessed an additional $68,383 in taxes, interest and penalties. On September 2, 1999, Greve and Luke met, and Greve admitted that he had omitted $107,888 of income in 1997. Luke determined that Greve kept inadequate books and records and employed unacceptable accounting procedures. Additionally, Greve told Luke that he and his wife had recently hired an accountant to prepare their future income tax returns.

Appendix A

Immediately following the September 2, 1999 interview, Luke mailed Greve an IRS Information Document Request ("IDR") seeking bank records that would reflect unreported gross receipts. On September 24, 1999, Greve turned over the requested bank deposit records.

On January 13, 2000, Luke began reviewing her file on Greve. On January 31, 2000, Luke reviewed the documents that Greve gave her and noted that some of the documents appeared to have been altered and that she did not have all of Greve's account information. On February 1, 2000, Luke noted that she needed to discuss the case with her group manager, Margaret Songer, and that Greve's case potentially involved fraud as opposed to merely an understatement of income.

On March 9, 2000, Luke met with Songer, who agreed that the case "may have fraud potential." Songer set up a meeting between Luke and the IRS District Fraud Coordinator, Michael Welu. The Fraud Coordinator helps develop potential fraud cases and instructs revenue agents and tax auditors how to investigate cases that may involve civil fraud or result in a criminal referral to the IRS Criminal Investigation Division ("CID").

On March 28, 2000, Welu and Luke met for seven hours about the Greve audit. During that meeting, Welu suggested that Luke expand the audit to include the 1998 tax year, obtain the 1996 tax year returns, and confirm whether Greve altered the documents he gave Luke. Welu directed Luke to issue administrative summonses to Greve's banks because they could assist in determining whether Greve had any hidden accounts.

Appendix A

On March 29, 2000, Luke contacted Greve and requested additional documents and another interview. She also advised Greve that she would be issuing him an IDR for tax years 1997 and 1998. During that conversation, Greve told Luke that he only reported income from customers who did not issue him an IRS Form 1099 and claimed that he did this because the IRS already knew about the income reported on the 1099 forms. After the conversation ended, Luke wrote a note reminding herself to determine whether Greve had altered the documents he previously provided.

On March 30, 2000, Welu informed Luke that Greve had been involved in several large cash transactions, possessed a previously undisclosed bank account, and had transferred his home into a trust shortly after the IRS audit began. Luke faxed Welu her proposed IDR for the 1997-1998 tax years for his review and approval. On April 4, 2000, Luke spent six hours reviewing Greve's file. She prepared an Examination Request for tax year 1998, seeking permission to expand the audit to include that year. The stated reasons for the request were "recurring issue" and "develope [sic] for fraud." Luke also prepared a request for tax year 1996 for "info only."

On April 6, 2000, Luke gave Greve the IDR she prepared with Welu for the 1997-1998 tax years and faxed Songer the previously prepared examination request. Luke also told Songer that she still had "to develop the fraud case" against Greve. On April 19, 2000, Luke prepared administrative summonses and retrieved IRS information on Greve's 1996 and 1998 tax returns.

Appendix A

On May 5, 2000, Greve requested additional time to produce his records. He told Luke that he was overwhelmed by the number of documents she requested and did not know how to organize them. Luke told Greve how to organize the records and gave him more time to gather them. On May 8, 2000, Greve called Luke to tell her that he had retained an attorney, Christopher Saternus. Saternus requested more time to gather Greve's documents. On June 15, 2000, Luke noted that she could not proceed with the audit until she received the requested documents from Greve, so she called Saternus and told him that she needed the documents to proceed with her examination.

On July 10, 2000, Greve called Luke to discuss the document request. He informed her that he had requested his customers' cancelled checks from his bank but did not have all of them. Luke told Greve that the records were due by July 20, 2000.

On July 20, 2000, Luke met with Saternus and Greve. Saternus asked whether Luke would be able to wrap up the audit for the years in question after she received the requested documents. Luke responded that there would be additional taxes, interest, and penalties and that the audit would be "wrapped up pretty quickly" after their meeting upon final review and determination. Greve and Saternus gave Luke all of the requested documents and acknowledged that Greve had understated his income in 1997 and 1998 by approximately $245,000.

Between July 20, 2000 and October 17, 2000, Luke continued her review of Greve's records. On October 2, 2000,

Luke advised Songer that she had completed the majority of the work involved in determining the gross receipts but that she had learned of a new bank account in Greve's wife's name. The following day, Greve called Luke and inquired about the audit's status. Luke told Greve that she needed the documents on the newly-discovered bank account and that she might ask Greve for an extension of the civil statute of limitations.

On January 23, 2001, after discussing the audit with Welu, Luke downloaded the IRS fraud handbook. Luke's notes from the following day indicate that she needed to conclude the audit and either "write up referral or close agreed." On January 25, 2000, Luke noted that she needed to set an appointment with Welu to complete the referral of the criminal fraud case. The next day, Luke scheduled a meeting with Welu to "write fraud referral." On February 15, 2001, Luke and Welu met to discuss the status of the audit. Welu told Luke that she could not refer the matter to CID because she needed to be able to show that Greve made an "overt action." Welu instructed Luke to contact Greve's customers to determine why they did not issue him 1099 forms for work he performed for them. Welu and Luke also discussed the applicable statute of limitations for civil assessment. Welu noted that because Greve omitted over 25% of income, the statute could be extended. Luke contacted several of Greve's customers and requested information regarding their payments to him.

On March 23, 2001, Luke met with Welu for another six hours. Following that meeting, Luke wrote up her CID referral report, which noted that Greve filed a "W-9 with

several customers claiming that he was incorporated when he was in fact not. These customers issued no 1099's [sic]." On March 26, 2001, Songer e-mailed Welu asking about the referral's status. Welu e-mailed Songer that the referral had been made. Songer then e-mailed Luke with the news, stating, "O ye of little faith." On April 2, 2001, Special Agent Mark Johnson met with Luke, Welu, and Songer to discuss the case.

On March 29, 2005, a federal grand jury indicted Greve on four income tax offenses, alleging violations of 26 U.S.C. § 7206(1). Count One charged Greve with failing to report $158,539 in gross receipts in his personal tax return for tax year 1998. Count Two charged Greve with failing to report $201,736 in gross receipts in his personal tax return for tax year 1999. Count Three charged him with failing to report $388,365 in gross receipts in a tax return for Greve Construction, Inc. for tax year 2000. Count Four charged Greve with claiming a false S corporation loss and a false refund in his personal income tax return for tax year 2000.

Greve filed a motion to dismiss the indictment and/or suppress evidence, alleging that the IRS had unconstitutionally obtained statements and documents for him by conducting a civil audit of Greve after it had "firm indications of fraud." Greve also filed a motion for leave to conduct discovery and requested an evidentiary hearing on his initial motion. On December 12, 2005, the district court, accepting as true all of the facts alleged by Greve, denied the motions, finding that the facts reflected a "typical IRS civil investigation that ultimately led to a criminal referral." Greve appeals.

Appendix A

II. Discussion

A. Motion to Dismiss the Indictment

Greve contends that the district court erred by denying his motion to dismiss the indictment because the IRS presented illegally obtained evidence to the grand jury. This Court reviews questions of law in a district court's ruling on a motion to dismiss an indictment de novo. *United States v. Peters,* 153 F.3d 445, 451 (7th Cir.1998). It reviews factual findings for clear error. *Id.* The Supreme Court has held that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . , if valid on its face, is enough to call for a trial on the merits." *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956). The Court's reluctance to examine the quality or sufficiency of the evidence presented to a grand jury extends even to unconstitutionally obtained evidence. *See United States v. Calandra,* 414 U.S. 338, 344-45, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (stating that "an indictment valid on its face is not subject to challenge on the ground that . . . the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination"). Accordingly, even if the grand jury examined illegally obtained evidence, the district court did not err by denying Greve's motion to dismiss the indictment.

B. Motion to Suppress

Greve next argues that the district court erred by denying his motion to suppress because the IRS obtained evidence against him in violation of his Fourth and Fifth Amendment

rights by conducting a covert criminal investigation under the guise of a routine civil audit. We review questions of law in a district court's ruling on a motion to suppress de novo. *Peters,* 153 F.3d at 451. We review factual findings for clear error. *Id.*

Greve contends that Luke affirmatively misled him by continuing to conduct a civil audit after she had firm indications of fraud. *See United States v. Serlin,* 707 F.2d 953, 956 (7th Cir.1983) (stating that a defendant seeking suppression must produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of their investigation). Although the IRS regulations require a civil investigator to cease her investigation when she has developed firm indications of fraud, *see* Internal Revenue Manual §§ 4565.21(1), 9311.83(1), we have held that "[a] failure to terminate a civil investigation when the revenue agent has obtained firm indications of fraud does not, without more, establish the inadmissibility of evidence obtained by [the agent] in continuing to pursue the investigation." *United States v. Kontny,* 238 F.3d 815, 820 (7th Cir.2001). Indeed, "[p]roof of deceit must be linked up to the constitutional standard of threat or promise." *Id.* at 819. In other words, Greve must prove that Luke induced his compliance through false promises.

Greve maintains that Luke made false promises to him by repeatedly advising him that his cooperation would result solely in a civil tax assessment. Greve first identifies a July 10, 2000 phone conversation, in which Greve called Luke to tell her that he was having difficulty obtaining all of the cancelled checks, and Luke told him not to worry because

the records were due on July 20, 2000. Greve contends that "clearly, Luke [wa]s promising Greve that the case would be concluded if he provided his deposit records and further cooperated on July 20, 2000." We disagree. We have stated that an inappropriate promise might occur if an agent "pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperate[s]." *Kontny,* 238 F.3d at 819. However, no such affirmative promise occurred during this conversation. Rather, it dealt solely with the timing of Greve's compliance with an IDR.

Next Greve points to the meeting on July 20, 2000 between Luke, Saternus, and Greve at the IRS's office. Saternus asked whether Luke would be able to wrap up the audit for the years in question once she received the requested documents. In response, Luke stated that upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up following the meeting. Greve maintains that Luke's response was a promise not to refer the case to CID and to proceed in a civil manner only. Again, there was simply no such promise. In fact, Luke qualified her statement by saying that any decisions were dependant upon review and final determination. Although Luke did not inform either Saternus or Greve that she might refer the case to CID for a criminal investigation, she was not required to do so. *See Serlin,* 707 F.2d at 956 (stating that "[s]imple failure to inform the defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit"). Consequently, the district court did not err by denying Greve's motion to suppress.

C. Evidentiary Hearing

Greve argues that the district court erred by denying his motion for an evidentiary hearing. This Court reviews a district court's denial of an evidentiary hearing for an abuse of discretion. *United States v. Juarez,* 454 F.3d 717, 719 (7th Cir.2006). To obtain an evidentiary hearing on his motion to suppress, Greve was required to "provide sufficient information to enable the court to conclude that a substantial claim [wa]s presented and that there [we]re disputed issues of material fact which w[ould] affect the outcome of the motion." *Id.* at 720. In ruling on Greve's motion to suppress, the district court accepted Greve's factual assertions as true. Because the government did not dispute the facts of the IRS investigation as relayed by Greve, the district court had no need to make a credibility determination. Consequently, the district court did not abuse its discretion by denying Greve's motion for a hearing.[1]

III. Conclusion

For the above reasons, we Affirm the district court's judgment.

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1. Greve also claims that the district court erred by denying his motion for further discovery. However, because the district court properly denied Greve's motion to dismiss and motion to suppress, we need not address his challenge to the district court's denial of his motion for additional discovery. *See Larkin v. Galloway,* 266 F.3d 718, 724 (7th Cir.2001).

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION DECIDED DECEMBER 12, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

No. 05 CR 50031

UNITED STATES of America,

Plaintiff,

v.

James F. GREVE,

Defendant.

Decided: December 12, 2005

REINHARD, District Court Judge.

For the reasons set forth below, the court denies defendant's motion for discovery, motion to dismiss and/or suppress, and the request for an evidentiary hearing.

Defendant, James F. Greve, who has been indicted for tax fraud, filed a motion to dismiss and/or suppress evidence based on his contention that the evidence to be used against him was gathered pursuant to a bad faith investigation. In

his motion, he also requests an evidentiary hearing. Related to the motion to dismiss/suppress, defendant has also filed a motion seeking disclosure by the government of certain materials. Both motions are fully briefed.[1]

As a initial matter, the court find that it can rule on the motion to dismiss/suppress without conducting an evidentiary hearing because, accepting defendant's factual assertions as true, defendant has not shown any entitlement to relief. Further, as the court will discuss later, defendant has not met the test that would justify additional disclosure from the government.

There can be no doubt that the controlling case in the Seventh Circuit is *United States v. Peters*, 153 F. 3d 445 (7th Cir. 1998), which reiterates the applicable standard governing defendant's motion to dismiss/suppress and additionally elaborates on the various considerations relevant to that standard.[2] Thus, this court begins its analysis with that case.

A consensual search is unreasonable under the Fourth Amendment and/or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery, or misrepresentation.[3] *Peters*, 153 F. 3d. at 451. To

1. The court notes the excellent briefs submitted by both parties.

2. While the parties have a some disagreement over the applicable standard, that disagreement appears to be mostly semantical. Nonetheless, the standard is clearly set forth in *Peters*.

3. As in *Peters*, defendant here seeks to suppress both statements and documentary evidence. Because his constitutional claims depend on a showing of fraud, deceit, trickery, or misrepresentation, it is not necessary to discuss each claim separately. See *Peters*, 153 F. 3d at 451 n. 8.

prevail, a defendant must show, by clear and convincing evidence, that: (1) the IRS agents affirmatively misled him as to the true nature of their investigation; and (2) the alleged misinformation materially caused him to provide information to the agents. *Peters*, 153 F. 3d at 451. Simple failure to inform a defendant that he is the subject of the investigation, or that the investigation was criminal in nature, does not amount to deceit unless the defendant inquired about the investigation and the agent's failure to respond was intended to mislead. *Peters*, 153 F. 3d at 451.

The *Peters* court further identified the following considerations relevant to whether the IRS agents affirmatively misled a defendant: (1) a failure to advise a defendant of the obvious criminal nature of the investigation; (2) a misrepresentation of the possibility of a criminal referral in order to obtain information for use in the fraud investigation; (3) an active involvement by a criminal investigator in a civil audit prior to a criminal referral being made; (4) a continuation of audit activities after the revenue agent begins preparation of the criminal fraud referral; and (5) a revenue agent continuing with the investigation in the face of firm indications of criminal fraud. *Peters*, 153 F. 3d at 453-54.

Additionally, the court of appeals mentioned several considerations that inform the question of whether a firm indication of fraud exists in a given case. One is whether there is a consistent pattern of substantial under reporting of income or overstatement of deductions such that intent to evade can be inferred. *Peters*, 153 F. 3d at 455. Another is the need to recognize that revenue agents who discover

potential violations of the tax laws will typically give a taxpayer an opportunity to explain before deciding to refer the matter or not. *Peters*, 153 F. 3d at 455. Put another way, a revenue agent's exploration of the case with the taxpayer in an effort to assess the taxpayer's state of mind is critical to determining if there are firm indications fo fraud in a given case. Finally, a firm indication of fraud should be distinguished from a "first indication of fraud." The latter being mere suspicion that justifies further investigation. *Peters*, 153 F. 3d at 455-56.

Before applying the standard and its relevant considerations to this case, the court emphasizes that the ultimate question is whether the IRS agents affirmatively misled defendant such that it materially caused him to provide information that he would not have otherwise provided. In doing so, no one consideration, including firm indications of fraud, is controlling. See *Peters*, 153 F. 3d at 456.

Viewing all of the factual assertions relied on by defendant as true, defendant has not met the standard in this case. In that regard, the court is compelled to characterize the nature of this case. The facts reflect a typical IRS civil investigation that ultimately led to a criminal referral. Like most such situations, it cannot be viewed with hindsight. The revenue agent in this case began her civil investigation as part of a tax audit. As she did so, she naturally obtained additional evidence, some of which apparently caused her to suspect that criminal fraud may have been committed. Reflecting those initial suspicions, she had discussions with her supervisor and the fraud coordinator, both with whom she should have had such discussions to do her job properly.

There is no indication that either of those individuals directed her to conduct a criminal investigation under the guise of a civil one.

Obviously, like any civil tax investigation, the investigator attempted to determine the extent of the civil liability. In doing so, evidence of criminal liability began to emerge. At that point, the revenue agent was required to ascertain whether her case continued to be civil or had become criminal in nature. Such a determination necessarily requires additional investigation lest every run of the mill civil case with some indication of criminality would get referred as criminal. The line is admittedly a very gray one and even more so from the perspective of the revenue agent at the time she is engaged in the process. The court further notes that it is not unnatural for a defendant to speculate about the true intention of the revenue agent in light of the mistrust one might generally have for a large governmental agency charged with collecting taxes. These competing concerns are why there must be clear and convincing evidence of such bad faith or evil intent to take advantage of the tax payer before a court will disrupt the process of an administrative agency such as the IRS. Defendant has failed to establish such evidence in this case.

Looking at the relevant considerations delineated by the Seventh Circuit, defendant has not shown that there was a failure to advise him of the obvious criminal nature of the investigation prior to it being referred criminally. As discussed above, the case was simply not criminal in nature until the time it was referred and certainly not obviously so before that time.

Appendix B

Defendant has also not shown any misrepresentation regarding a referral in this case with any intent to obtain further information from him. While he complains of the vague responses by the revenue agent during the July 20, 2000, meeting, the questions posed were equally vague and did not command anymore specific of a response. They also may very well have not been interpreted as direct queries about possible criminal referral. Further, the lack of any comment by the agent in the absence of any questions does not evidence any intent to mislead under the facts of this case.

There is also no evidence of any active involvement by any criminal investigator in the revenue agent's case. While defendant makes much of the interaction between revenue agent Luke and Welu, Welu was the fraud coordinator whose job duties included providing advice and input to a revenue agent whose investigation was arguably hinting at criminal fraud. Welu's role in this case was clearly not one of a criminal investigator directing Luke's actions for the purpose of garnering evidence for a criminal prosecution.

Nor has defendant shown a continuation of civil audit activities after the revenue agent began her preparation of the criminal fraud referral. While preparation, taken to its logical extreme, could be interpreted to include the first conduct by Luke that eventually led to completion of the referral, the court will not give it so broad a meaning for fear of converting every civil investigation into a criminal one at its outset. Rather, the court considers preparation in this context to mean the actual physical preparation of the referral itself. That being said, no significant investigative activities

were undertaken by Luke in this case after she began her preparation of the criminal referral.

That leaves the issue of whether defendant has pointed to any facts that Luke continued to investigate in the face of firm indications of criminal fraud. As noted earlier, the firm indications of fraud consideration is inherently a gray one and extremely fact intensive. Applying a reasonable person approach, as the court believes it should in light of the Fourth and Fifth Amendment challenges raised by defendant, the evidence as relied on by defendant does not support his claim that there were firm indications of fraud during any of the time Luke was actively engaged in conduct related to her fraud investigation. Moreover, to the extent the evidence in this case arguably suggests firm indications of fraud existed prior to the referral, it is so inconclusive that it simply is not significant enough to allow this court to conclude that Luke affirmatively misled defendant.

Having applied the standard and all relevant considerations as outlined by the court of appeals, the court finds that defendant has not shown by clear and convincing evidence that Luke or any other IRS representative affirmatively misled defendant as to the true nature of the investigation. That being the case, the court also concludes that no colorable basis has been shown to justify further discovery as it relates to defendant's motion to dismiss/ suppress. For these reasons, the court denies both defendant's motion for discovery and motion to dismiss and/or suppress, and also denies his request for an evidentiary hearing.

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No. 07-300

FILED
NOV 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JAMES GREVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RICHARD T. MORRISON
Acting Assistant Attorney General
ALAN HECHTKOPF
JOHN HINTON, III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that the Internal Revenue Service (IRS) did not violate petitioner's Fourth and Fifth Amendment rights in the course of a routine civil tax audit.

2. Whether the district court abused its discretion in denying petitioner's motions for discovery and for an evidentiary hearing on his claim that the IRS violated his Fourth and Fifth Amendment rights in the course of a routine civil tax audit.

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In the Supreme Court of the United States

No. 07-300

JAMES GREVE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 490 F.3d 566. The opinion of the district court (Pet. App. 12a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. The petition for a writ of certiorari was filed on September 4, 2007 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of one count of filing a false federal income tax return, in violation of 26 U.S.C. 7206(1). The

district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. During the time period at issue in this case,[1] the Internal Revenue Service (IRS) "split[] the responsibility for enforcing the nation's tax laws between its two investigative divisions": the Examination Division and the Criminal Investigative Division (CID). *United States* v. *Peters*, 153 F.3d 445, 447 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999). The CID was "charged with investigating criminal violations of the tax code and related federal statutes." *Ibid.* Its investigators, called "special agents," generally operated like other criminal law enforcement agents, carrying firearms and badges. *Ibid.* A special agent was required to "recite an administrative warning prior to soliciting information from taxpayers." *Ibid.*

In contrast, the Examination Division was responsible for conducting civil tax audits, and its investigators were known as "revenue agents." *Peters*, 153 F.3d at 447. They did not carry weapons and were not required to "provide taxpayers with an administrative warning" before soliciting information from them. *Ibid.*

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[1] After the events giving rise to this case, the IRS reorganized, renaming the old Criminal Investigation Division the Criminal Investigation component and relocating the functions of the old Examination Division to several new components. See generally *Joint Review of the Strategic Plans and Budget of the Internal Revenue Service: Hearing Before the House Comm. on Ways and Means, House Comm. on Appropriations, House Comm. on Gov't Reform, Senate Comm. on Fin., Senate Comm. on Appropriations, and Senate Comm. on Governmental Affairs*, 107th Cong., 1st Sess. 93-94 (2001) (statement of David C. Williams, Inspector General for Tax Administration, Department of Treasury).

Although an Examination Division audit often "conclude[d] with some sort of civil settlement between the IRS and the taxpayer," an audit sometimes "uncover[ed] evidence that cause[d] the revenue agent to refer the case to the CID for criminal investigation." *Peters*, 153 F.3d at 447. According to the IRS's internal manual, when a revenue agent "discover[ed] a firm indication of fraud on the part of the taxpayer," she was to cease her investigation and refer the case to the CID. *Internal Revenue Manual* § 4.23.9.6.2 (2003). The manual cautions, however, that "[a] *firm* indication of fraud must be distinguished from a *first* indication of fraud," which is a mere suspicion of fraud. *Ibid.* (emphasis added). In order to determine whether a firm indication of fraud has been found, a revenue agent was to "consult with" her supervisor and the District Fraud Coordinator, the person responsible for advising revenue agents about how to investigate cases that may involve civil fraud or result in a referral to the CID. *Ibid.*; Gov't C.A. Br. 5-6.

2. Petitioner owned and operated a snow-plowing business. Pet. App. 2a. From 1990 until 2000, petitioner prepared his own federal income tax returns, using a hybrid cash and accrual method of reporting income. *Ibid.* Over a six-year period in the 1990s, petitioner omitted approximately $1.3 million in business receipts from his business tax returns and falsely claimed refunds on his individual tax returns. Gov't C.A. Br. 4.

In 1999, the IRS began a routine civil audit of petitioner's 1997 federal income tax return. During his initial interview with an IRS revenue agent, petitioner admitted that he had not reported approximately $108,000 in income on his 1997 individual income tax return. The revenue agent advised petitioner that he had kept inadequate documentation of his income, and petitioner re-

plied that he had recently hired an accountant for future income tax returns. Pet. App. 2a.

After that interview, the revenue agent issued petitioner a request for bank records that would reflect unreported gross receipts, and petitioner produced some bank records. The revenue agent reviewed those records, and she determined that she had not been given all of the records she had requested and that some of the records might have been altered. She observed in her audit notes that the case "potentially involved fraud as opposed to merely an understatement of income." Pet. App. 3a.

Several weeks later, the revenue agent discussed the audit with her supervisor, who agreed that the case "may have fraud potential" and arranged a meeting with the District Fraud Coordinator. Pet. App. 3a. After a discussion of petitioner's case, the District Fraud Coordinator recommended that the revenue agent expand her audit to include tax year 1998 and confirm whether petitioner had provided altered documents to the IRS. The revenue agent then contacted petitioner to request additional documents and another interview. In the course of that conversation, the revenue agent asked petitioner about his unreported 1997 income, and petitioner replied that he had only reported income from customers who did not issue him IRS Forms 1099, on the theory that the IRS was already aware of the income reported on Forms 1099. *Id.* at 3a-4a; Gov't C.A. Br. 6-7.

In the meantime, the District Fraud Coordinator reviewed the audit file and noted that petitioner had a previously undisclosed bank account, had placed his residence in a trust upon learning that the IRS was auditing him, and had engaged in numerous large cash transactions. The revenue agent reviewed the file and pre-

pared examination requests for 1998 (providing as reasons "recurring issue" and "develop[] for fraud") and for 1996 (with a note that it was for "info only"). Pet. App. 4a. The revenue agent then retrieved IRS information relevant to petitioner's 1996 and 1998 tax returns and requested additional documents from petitioner related to the 1997 and 1998 tax years. Petitioner requested additional time in which to provide those documents, which the revenue agent allowed. But after several months passed, the revenue agent determined that she was unable to proceed with the audit until she received the documents she had requested, so she gave petitioner a deadline of July 20, 2000. *Id.* at 4a-5a.

On July 20, the revenue agent met with petitioner and his newly retained counsel. Counsel asked the agent whether she would be able to wrap up the audit for the years in question upon receipt of the documents that petitioner had assembled. Pet. App. 5a. He also asked "where things were going" and "what [petitioner] was looking at." Pet. C.A. Br. 14. The agent replied that upon review and final determination, there likely would be additional tax due, plus interest and penalties, but that the matter should be "wrapped up" quickly following the meeting. Petitioner provided the agent with the requested documents and admitted that he had understated his 1997 and 1998 income by approximately $245,000. Pet. App. 5a.

In October 2000, the revenue agent advised her supervisor that she had completed most of the audit, but that she had learned of a new bank account in the name of petitioner's wife. The next day, petitioner called the revenue agent and asked her for a status report on the audit. The agent replied that she needed the bank records relating to his wife's account and that she might

request an extension of the civil statute of limitations from him. Pet. App. 5a-6a.

In January 2001, after another discussion with the District Fraud Coordinator, the revenue agent obtained a copy of the IRS Fraud Handbook and wrote herself a note that she should either "write up [a] referral" to criminal fraud investigators or "close" the case by having petitioner agree to a tax deficiency. Pet. App. 6a. She then completed her analysis of petitioner's bank accounts and scheduled a meeting with the District Fraud Coordinator. *Ibid.* In that meeting, the District Fraud Coordinator concluded that, because there was insufficient evidence of petitioner's intent to evade tax, the case was not ready for referral to CID. *Ibid.*; Gov't C.A. Br. 11. The revenue agent contacted several of petitioner's customers and verified that they had not filed Forms 1099 with the IRS, apparently because petitioner misrepresented to them that he had incorporated when he had not. Pet. App. 6a-7a; Gov't C.A. Br. 12. The revenue agent then provided that new information to the Fraud Coordinator, and the matter was referred to CID. Pet. App. 7a. CID accepted the fraud referral and conducted a criminal investigation that, several years later, culminated in petitioner's indictment on charges extending well beyond the subject matter of the civil audit. *Ibid.*; Gov't C.A. Br. 12.

3. A federal grand jury in the Northern District of Illinois charged petitioner with four counts of filing false federal income tax returns for the tax years 1998-2000, in violation of 26 U.S.C. 7206(1). Pet. App. 7a. Petitioner moved to dismiss the indictment and to suppress evidence, arguing that the IRS had obtained documents from him by conducting a civil audit as a guise for a criminal investigation, in violation of the Fourth and

Fifth Amendments. *Ibid.* He also sought additional discovery and an evidentiary hearing. *Ibid.*

The district court noted that "[a] consensual search is unreasonable under the Fourth Amendment and/or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery, or misrepresentation." Pet. App. 13a. Relying on *United States* v. *Peters*, 153 F.3d 445 (7th Cir. 1998), which applied that general rule in the context of an IRS investigation, and "[v]iewing all of the [petitioner's] factual assertions * * * as true," the district court found no Fourth or Fifth Amendment violation. Pet. App. 13a-18a.[2] It characterized the IRS investigation here as "a typical IRS civil investigation that ultimately led to a criminal referral." *Id.* at 15a. The revenue agent "began her civil investigation as part of a tax audit"; "obtained additional evidence," some of which "caused her to suspect that criminal fraud may have been committed"; "had discussions with her supervisor and the fraud coordinator," which were necessary "to do her job properly"; and was never told "to conduct a criminal investigation under the guise of a civil one." *Id.* at 15a-16a. As "evidence of criminal liability began to emerge," the revenue agent requested additional documents from and meetings with petitioner to confirm or deny her suspicion of fraud, rather than immediately—and prematurely—referring the case to CID. *Id.* at 16a.

The district court rejected petitioner's argument that the revenue agent's noncommital response regarding when the audit might be "wrapped up" was an affirmative misrepresentation because "the questions [peti-

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[2] Because petitioner established no basis for relief even accepting all of his factual assertions as true, the district court declined to conduct an evidentiary hearing. Pet. App. 13a.

tioner] posed were equally vague and did not command any more specific of a response." Pet. App. 17a. And the court noted that there was "no evidence of any active involvement by any criminal investigator" in the audit and no "continuation of civil audit activities after the revenue agent began her preparation of the criminal fraud referral." *Id.* at 17a-18a. Finally, the court found that there were no "firm indications of fraud during any of the time the [revenue agent] was actively engaged in conduct related to her fraud investigation." *Id.* at 18a; see *Internal Revenue Service Manual* § 4.23.9.6.2 (directing a revenue agent to suspend her audit when there is a "firm indication of fraud").

The district court thus found that "no colorable basis has been shown to justify further discovery" and denied petitioner's motion for discovery and motion to dismiss the indictment and suppress evidence. Pet. App. 18a.

Petitioner entered a conditional guilty plea to one count of the indictment, reserving his right to appeal the district court's denial of his motion to dismiss and to suppress evidence and his related discovery motion. Gov't C.A. Br. 14. The district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. Gov't C.A. App. C1-C5.

4. The court of appeals affirmed. Pet. App. 1a-11a. It first held that the district court correctly refused to dismiss the indictment, explaining that "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for a trial on the merits." *Id.* at 8a (quoting *Costello* v. *United States*, 350 U.S. 359, 363 (1956)).[3]

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[3] Petitioner does not renew in the petition his request for dismissal of the indictment and accordingly that aspect of the court of appeals' decision is no longer at issue in this case.

The court then rejected petitioner's argument that the IRS obtained evidence from him in violation of the Fourth and Fifth Amendments. The court noted that, although the IRS manual directs "a civil investigator to cease her investigation when she has developed firm indications of fraud," a "'failure to terminate a civil investigation'" at that point "'does not, without more, establish the inadmissibility of evidence obtained'" as the agent continues to pursue the investigation, because "[p]roof of deceit must be linked up to the constitutional standard of threat or promise." Pet. App. 9a (quoting *United States* v. *Kontny*, 238 F.3d 815, 819-820 (7th Cir.), cert. denied, 532 U.S. 1022 (2001)). As an illustration, the court observed that "an inappropriate promise might occur if an agent 'pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperate[s].'" *Id.* at 10a (quoting *Kontny*, 238 F.3d at 819).

Reviewing the district court's factual determinations for clear error, the court of appeals concluded that IRS officials had not made any false promises to petitioner. Pet. App. 9a-10a. The court reviewed a July 10, 2000, phone conversation in which petitioner told the revenue agent that he was having difficulty obtaining all of the requested documents, and the revenue agent "told him not to worry because the records were due on July 20, 2000." *Ibid.* Although petitioner claimed that the revenue agent was "promising [him] that the case would be concluded if he provided his deposit records and further cooperated on July 20, 2000," the court found that "no such affirmative promise occurred during this conversation." *Id.* at 10a.

The court came to the same conclusion regarding the July 20, 2000, meeting, where petitioner's counsel asked

if the audit would soon be "wrap[ped] up" and the revenue agent responded that "upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up." Pet. App. 10a. The court found that the revenue agent "made no promise" that she would not refer the case to CID, and that her failure to advise petitioner of that possibility did not amount to affirmative deceit. *Ibid.*

Finally, the court of appeals held that the district court did not abuse its discretion in declining to hold an evidentiary hearing, because the "district court accepted [petitioner's] factual assertions as true" and "the district court had no need to make a credibility determination." Pet. App. 11a.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in finding that IRS agents did not violate his Fourth or Fifth Amendment rights. According to petitioner, the agents "conducted a 'covert criminal investigation'" in the guise of a civil audit. Pet. 10. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals.

a. "[A] consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent." *United States* v. *Peters*, 153 F.3d 445, 451 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999); see, *e.g.*, *United States* v. *Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). As the court of appeals correctly noted, although the IRS manual directs a revenue agent to terminate her investigation once she has found "firm indications of fraud," a failure to terminate the investigation at that

point does not require suppression of any evidence obtained through further investigation. Pet. App. 9a.[4] Rather, "[p]roof of deceit must be linked up to a constitutional standard of threat or promise." *Ibid.* (quoting *United States* v. *Kontny*, 238 F.3d 815, 819 (7th Cir.), cert. denied, 532 U.S. 1022 (2001)). Petitioner does not dispute that legal rule (Pet. 10-11); rather, he contends that the court of appeals erred in failing to find an impermissible promise on the facts of this case.

The court of appeals' conclusion that the IRS revenue agent did not make any false promises was correct. Petitioner identified two instances in which he alleges that the revenue agent made such a promise. The first was an instance in which petitioner called the revenue agent because he was having difficulty obtaining the documents the IRS had requested, and the revenue agent told him not to worry because the records were not due for ten days. Pet. App. 9a-10a. The court of appeals correctly found that the revenue agent made no promise; her comments simply addressed "the timing of [petitioner's] compliance" with the request for documents. *Id.* at 10a.

The second instance cited by petitioner is similarly unremarkable. Petitioner's counsel asked the revenue agent whether she would be able to wrap up the audit once she received the documents she had requested, and she replied that "upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up following the meeting." Pet. App. 10a. Again, the court of appeals

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[4] The *Internal Revenue Service Manual* is an internal guidance document; it does not have the force of law and is not binding on the IRS. See *Fargo* v. *Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006) (citing cases).

correctly found that the revenue agent's statement fell well short of a promise that no criminal consequences would ensue. *Ibid.* (noting that the revenue agent "qualified her statement by saying that any decisions were dependent upon review and final determination"). Indeed, as the district court explained, the agent's "vague response[ ]" was unsurprising in light of the fact that "the questions posed were equally vague." *Id.* at 17a. Further, although petitioner claims that the revenue agent should have "advise[d] [him] of the obvious criminal nature of the investigation," Pet. 11, a revenue agent generally has no affirmative obligation to advise a taxpayer of the nature of her investigation, *Peters*, 153 F.3d at 447. See *United States* v. *Serlin*, 707 F.2d 953, 956 (7th Cir. 1983) ("Simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead.").

Indeed, all indications suggest that the revenue agent engaged in a "typical IRS civil investigation," and that she was not using a civil audit as a subterfuge for criminal investigation. Pet. App. 15a. As the district court noted, the investigation began as a routine civil audit—it was not initiated "at the behest of a criminal law enforcement agency"—and there was no active involvement by criminal investigators in the audit. *Peters*, 153 F.3d at 453; see Pet. App. 17a.

Petitioner asserts (Pet. 10-11), without any explanation or record citation, that the IRS "actively involv[ed] a criminal investigator in the civil audit process." That assertion is baseless. To the extent petitioner is intending to suggest that the District Fraud Coordinator is a

"criminal investigator," petitioner is mistaken. As the court of appeals explained, the "Fraud Coordinator helps develop potential fraud cases and instructs revenue agents and tax auditors how to investigate cases that may involve *civil* fraud or result in criminal *referrals* to the IRS Criminal Investigation Division." Pet. App. 3a (emphases added). Thus, far from acting as a "criminal investigator," the District Fraud Coordinator instead assists in the development of *civil* fraud cases and in the determination whether a civil investigation has developed sufficient evidence of criminal activity to call for a criminal referral. Those are quintessentially *civil* investigatory activities.

Moreover, the revenue agent followed IRS procedures in developing her initial suspicions of fraud and providing petitioner with a chance to explain any discrepancies before immediately referring his case for criminal prosecution. See *Peters*, 153 F.3d at 456 ("Revenue agents must take adequate steps to perfect indications of fraud and must ensure that the fraud is substantial prior to making a referral to the CID."); Pet. App. 17a. The statements that petitioner identifies as misrepresentations—the agent's reassurance that petitioner still had time within which to comply with her document request, and her estimation to petitioner's counsel that she would complete her audit soon after her examination of petitioner's financial records—were made long before the District Fraud Coordinator considered the evidence sufficient to warrant a criminal referral. *Id.* at 16a-18a. Finally, and again consistent with IRS procedures, the revenue agent ceased her investigatory activities after she prepared a criminal fraud referral. See *Peters*, 153 F.3d at 454-455; Pet. App. 17a-18a. Petitioner's fact-bound claim of "actual deception" by

the IRS was correctly rejected by both the district court and the court of appeals, and in any event it does not warrant further review.

b. Petitioner contends (Pet. 11-12) that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Tweel*, 550 F.2d 297 (1977). According to petitioner (Pet. 11-12), the court below held that "the IRS could not violate [a taxpayer's] constitutional rights, notwithstanding the fact that it was conducting a covert criminal investigation under the guise of a civil audit, unless its agents 'pretend[ed]' to be Assistant United States Attorneys assuring [the taxpayer] that he will not be prosecuted if he cooperates." The court of appeals did not so hold. Rather, the court stated a general legal standard—that whether statements have been obtained in violation of the Constitution depends on whether IRS agents made an affirmatively misleading threat or promise—and then stated, by way of example, that "an inappropriate promise might occur if an agent pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperates." Pet. App. 9a-10a (internal quotation marks omitted).

The decision below presents no conflict with *Tweel*, because both the Fifth and Seventh Circuits apply the same rule of law. Compare *Tweel*, 550 F.2d at 299 ("[A] consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent."), with Pet. App. 9a ("[a taxpayer] must prove that [a revenue agent] induced his compliance through false promises"), and *Peters*, 153 F.3d at 451 ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amend-

ment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent.").

Although the outcome in *Tweel* was different from the outcome here, that difference is the result of stark factual differences between the two cases. In *Tweel*, unlike this case, an IRS agent commenced an audit at the specific request of the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice. 550 F.2d at 299. The taxpayer's accountant explicitly asked the revenue agent whether a special agent (*i.e.*, a criminal investigator) was involved in the audit, and the revenue agent replied that one was not. *Ibid.* Although that statement was technically correct, the agent "was acting at the request" of criminal investigators, and the Fifth Circuit determined that the agent's "failure to apprise the appellant of the obvious criminal nature of th[e] investigation" was a "silent misrepresentation [that] was both intentionally misleading and material." *Ibid.* In this case, by contrast, petitioner's audit was not instigated by a federal prosecutorial office; there were no criminal investigators involved in petitioner's audit; and the revenue agent did not mislead petitioner or his counsel about the pendency of a criminal investigation. Pet. App. 16a-18a. There is thus no conflict in the circuits suggesting a need to "articulate a clear standard concerning when the IRS during the course of a civil tax audit violates taxpayers' Fourth and Fifth Amendment rights." Pet. 9 (emphasis omitted).

c. Petitioner claims (Pet. 13) that the court of appeals erred by holding that "nothing that IRS agents do before beginning the actual preparation of the actual criminal referral document could demonstrate the unconstitutional acquisition of evidence." Petitioner pro-

vides no citation to the court of appeals' opinion for that alleged holding, and the court of appeals plainly did not so hold. To the contrary, the court correctly premised its legal rule on the well-established "constitutional standard of threat or promise." Pet. App. 9a.

2. Petitioner contends (Pet. 14-16) that the district court abused its discretion in denying him discovery and an evidentiary hearing on his claims. There is no conflict in the circuits on that issue, and petitioner's fact-bound challenge to the district court's discretionary determination does not warrant further review.

a. The court of appeals correctly determined that the district court did not abuse its discretion in declining to hold an evidentiary hearing or to order discovery. To obtain an evidentiary hearing, petitioner was required to establish a "substantial [constitutional] claim" and "disputed issues of material fact." Pet. App. 11a (quoting *United States* v. *Juarez*, 454 F.3d 717, 719-720 (7th Cir. 2006)). As petitioner himself notes (Pet. 7, 11, 12-13), the district court took all of his factual allegations as true, and there was thus "no need to make a credibility determination." Pet. App. 11a; see *id.* at 13a. Moreover, petitioner failed to adduce evidence of any threat or promise that would entitle him to relief under the Fourth or Fifth Amendment. See pp. 10-14, *supra*. Likewise, the court of appeals did not err in affirming the district court's denial of further discovery, because petitioner established "no colorable basis * * * to justify further discovery." Pet. App. 18a; see *id.* at 11a n.1. See also pp. 10-14, *supra*.

b. Petitioner asserts (Pet. 15-16) that the court below created a circuit conflict by establishing an "unrebuttable presumption of good-faith conduct of government investigatory agents notwithstanding the fact that

all of the admitted and deemed true facts * * * suggest strongly the exact opposite." Pet. 15. By contrast, according to petitioner, "several circuit courts of appeals * * * have held specifically that the IRS agent's motivation and intent * * * is highly relevant to determine whether * * * [the IRS's] investigatory practices were * * * unconstitutional." Pet. 15-16.

There is no conflict, for two reasons. First, nowhere in the decision below did the court of appeals adopt the rule petitioner suggests. Second, none of the cases cited by petitioner (Pet. 15-16) states that a court of appeals must consider a revenue agent's motivation in assessing an allegation of an unconstitutional threat or promise in the course of a civil tax audit. Indeed, several of those cases state precisely the opposite proposition, albeit in the different context of alleged bad-faith use of civil summons authority in a criminal case. For example, in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978), this Court explained that "the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS," because the IRS's "multilayered and thorough" "review process" makes the motivation of one special agent "hardly dispositive." *Id.* at 315-316. See *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (same); *United States* v. *Genser*, 595 F.2d 146, 151-152 (3d Cir.), cert. denied, 444 U.S. 928 (1979) (same).[5] There is thus no conflict in legal authority and no basis for further review.

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[5] The other case cited by petitioner, *United States* v. *Voight*, 89 F.3d 1050, 1067-1068 (3d Cir.), cert. denied, 519 U.S. 1047 (1996), is wholly inapposite, because it involved "alleged governmental intrusion into the attorney-client relationship," not alleged use of a civil tax audit as a guise for a criminal investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RICHARD T. MORRISON
Acting Assistant Attorney General

ALAN HECHTKOPF
JOHN HINTON, III
Attorneys

NOVEMBER 2007